

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

**M & D RENTAL CORPORATION,  
a Foreign Corporation,**

**Plaintiff,**

**vs.**

**Civil Action No. 15-C-38**

**FARMERS & MERCHANTS BANK AND TRUST, INC.,  
DEALERSHIP MANAGEMENT COMPANY, LLC,  
WINCHESTER HOSPITALITY, LLC,  
UNITED BANKSHARES, INC.,  
BGR ASSOCIATES, LLC,  
UNITED BANK, INC.  
MID-ATLANTIC GROUP, LLC,  
RJCPTP, LLC,  
PATTHOFF FAMILY, LLC,**

**Defendants.**

BERKELEY COUNTY  
CIRCUIT CLERK  
2015 JAN 23 AM 11:07  
VIRGINIA M. SIME, CLERK

**COMPLAINT**

COMES NOW the Plaintiff M & D Rental Corporation, by its counsel, Eric S. Black, Esquire, before this Honorable Court on this 16<sup>th</sup> day of January, 2015, respectfully complaining as follows:

**I. PARTIES**

1. Plaintiff M & D Rental Corporation is a corporation registered and licensed to do business in the State of West Virginia, with a principal office address of 5013 Ganelon Court, Annandale, Virginia 22003.

2. Defendant Farmers & Merchants Bank and Trust is a foreign corporation registered and licensed to do business in the State of West Virginia, with a principal office address of 59 West Washington Street, Hagerstown, Maryland 21740.

3. Defendant Dealership Management Company, LLC is a West Virginia limited liability company registered and licensed to do business in the State of West Virginia, with a principal office address of 48 Kelly Island Road, Martinsburg, West Virginia 25401.

4. Defendant Winchester Hospitality, LLC is a foreign limited liability company registered and licensed to do business in the State of West Virginia, with a principal office address of 975 Foxcroft Avenue, Martinsburg, West Virginia 25401.

5. Defendant United Bankshares, Inc. is a West Virginia corporation registered and licensed to do business in the State of West Virginia, with a principal office address of 500 Virginia Street East, Charleston, West Virginia 25301.

6. Defendant BGR Associates, LLC is a West Virginia limited liability company registered and licensed to do business in the State of West Virginia, with a principal office address of 7216 Armat Drive, Bethesda, Maryland 20817.

7. Defendant United Bank Inc. is a West Virginia corporation registered and licensed to do business in the State of West Virginia, with a principal office address of 500 Foxcroft Avenue, Martinsburg, West Virginia 25401.

8. Defendant Mid-Atlantic Group, LLC is a limited liability company with a principal office address of 11710 Old Georgetown Road, Suite 808, Rockville, Maryland 20852.

9. Defendant RJCPTP, LLC is a West Virginia limited liability company licensed and registered to do business in the State of West Virginia, with a principal office address of 600 Foxcroft Avenue, Martinsburg, West Virginia 25401.

10. Defendant Patthoff Family, LLC is a West Virginia limited liability company registered and licensed to do business in the State of West Virginia, with a principal office address of 300 Foxcroft Avenue, Suite 300, Martinsburg, West Virginia 25401.

## **II. STATEMENT OF FACTS**

11. Plaintiff re-alleges all of the foregoing paragraphs as if the same were incorporated and fully set forth herein.

12. In September 2011, L&B Development, LLC purchased a storm water management drain pond property comprising 1.6 acres and located in the Foxcroft Avenue area of Martinsburg, Berkeley County, West Virginia (hereinafter referred to as "the Property"). L&B Development, LLC purchased the Property from the Department of Delinquent and Non-Entered Lands of Berkeley County, West Virginia.

13. The Plaintiff M&D Rental Corporation manages the Property and provides management, administration, billing and collection services related to the Property.

14. The Defendants named in this Complaint comprise a number of local businesses who have storm water runoff drain into the Plaintiff's Property and who have derived a direct and substantial benefit as a result of said water drainage.

15. The surface waters from the Defendants' properties drain into the Plaintiff's storm water Property through a surface and subsurface drainage system consisting of head walls, pipes, grates, drainage swales and patterns, and other drainage facilities running under and around Foxcroft Avenue.

16. Defendant Farmers & Merchants Bank and Trust operates its business on a 0.57 acre tract of land located at 704 Foxcroft Avenue, Martinsburg, West Virginia, with a total square footage of 24,829 square feet.

17. Defendant Dealership Management Company, LLC operates its business on a 9.54 acre tract of land located at 650 Foxcroft Avenue, Martinsburg, West Virginia, with a total square footage of 415,562 square feet.

18. Defendant Winchester Hospitality, LLC operates its business on a 11.15 acre tract of land located at 301 Foxcroft Avenue, Martinsburg, West Virginia, with a total square footage of 485,694 square feet.

19. Defendant United Bankshares, Inc. operates its business on a 1.44 acre tract of land located at 450 Foxcroft Avenue, Martinsburg, West Virginia, with a total square footage of 62,726 square feet.

20. Defendant BGR Associates, LLC operates its business on a 3.44 acre tract of land located at 300 and 400 Foxcroft Avenue, Martinsburg, West Virginia, with a total square footage of 149,846 square feet.

21. Defendant United Bank Inc. operates its business on a 1.0 acre tract of land located at 500 Foxcroft Avenue, Martinsburg, West Virginia, with a total square footage of 44,431 square feet.

22. Defendant Mid-Atlantic Group, LLC operates its business on a 1.02 acre tract of land located at Foxcroft Avenue, Martinsburg, West Virginia, with a total square footage of 44,431 square feet.

23. Defendant RJCPTP, LLC operates its business on a 5.12 acre tract of land located at 601-609 Foxcroft Avenue, Martinsburg, West Virginia, with a total square footage of 223,027 square feet.

24. Defendant Patthoff Family, LLC operates its business on a 0.7 acre tract of land located at 300 Foxcroft Avenue, Martinsburg, West Virginia, with a total square footage of 30,492 square feet.

25. In 2001, a Declaration Of Storm Water Management Facility Easements And Covenant To Share Costs Agreement was executed by then existing Foxcroft Avenue business

owners for the management, maintenance, repair and upkeep of the storm water management Property. (A copy of said Declaration is appended hereto as Exhibit #1).

26. The Declaration of Storm Water Management Facility Easements and Covenant to Share Costs Agreement (hereinafter referred to as "the Agreement") is recorded in the Office of the Clerk of the County Commission of Berkeley County, West Virginia at Deed Book 665, Page 354.

27. Pursuant to the explicit language and terms of the Agreement, the Agreement expressly provides that its enforceability and provisions are binding against any and all "successors and assigns" and "present and future owners."

28. Since the time it purchased the Property in 2011, the Plaintiff has incurred significant costs and expenses related to the upkeep, maintenance and repair of the Property.

29. The costs and expenses incurred by the Plaintiff related to the Property have directly benefited the Defendants as each of the Defendants has obtained and received storm water management services when the water runoff from their businesses drain into the Plaintiff's Property.

30. Despite requests by the Plaintiff to each of the Defendants to pay for the storm water service provided and for the maintenance of the Property, none of the Defendants has paid its apportioned share to the Plaintiff.

31. Plaintiffs initiate the instant civil action against the Defendants seeking judgment for management, maintenance, repair and upkeep of the storm water management Property.

### **III. CAUSES OF ACTION**

#### **A. BREACH OF CONTRACT:**

32. Plaintiff re-alleges all of the foregoing paragraphs as if the same were incorporated and fully set forth herein.

33. In 2001, a Declaration Of Storm Water Management Facility Easements And Covenant To Share Costs Agreement was executed by then existing Foxcroft Avenue business owners for the management, maintenance, repair and upkeep of the storm water management Property.

34. The Declaration of Storm Water Management Facility Easements and Covenant to Share Costs Agreement (hereinafter referred to as "the Agreement") is recorded in the Office of the Clerk of the County Commission of Berkeley County, West Virginia at Deed Book 665, Page 354.

35. Pursuant to the explicit language and terms of the Agreement, the Agreement expressly provides that its enforceability and provisions are binding against any and all "successors and assigns" and "present and future owners."

36. Since the time it assumed the administration and management of the Property in 2012, the Plaintiff has incurred significant costs and expenses related to the upkeep, maintenance, management, repair and administration of the Property.

37. The costs and expenses incurred by the Plaintiff related to the Property have directly benefited the Defendants as each of the Defendants has obtained and received storm water management services when the water runoff from their businesses drain into the Plaintiff's Property.

38. Despite requests by the Plaintiff to each of the Defendants to pay for the storm water service provided and for the maintenance of the Property, none of the Defendants has paid its apportioned share to the Plaintiff.

39. The terms of the Agreement, which are binding upon the Defendants as explicitly stated in the Agreement, impose a clear and direct obligation to share costs for the "maintaining, repairing, replacing, and insuring" of the Property.

40. The Defendants have breached the terms of the Agreement by failing to share in the costs for the maintenance, repair and insuring of the storm water Property.

41. The Plaintiff has incurred (and continues to incur) damages as a direct and proximate result of the Defendants' breach of the Agreement which is binding upon the parties.

#### **B. UNJUST ENRICHMENT:**

42. Plaintiff re-alleges all of the foregoing paragraphs as if the same were incorporated and fully set forth herein.

43. Since the time it purchased the Property in 2011, the Plaintiff has incurred significant costs and expenses related to the upkeep, maintenance and repair of the Property.

44. The costs and expenses incurred by the Plaintiff related to the Property have directly benefited the Defendants as each of the Defendants has obtained and received storm water management services when the water runoff from their businesses drain into the Plaintiff's Property.

45. The costs and expenses incurred by the Plaintiff have directly and unjustly enriched each of the Defendants.

46. The Defendants' enrichment is unjust and inequitable.

47. The Defendant's unjust enrichment has directly and proximately at the expense of the Plaintiff in this matter.

**NOW, WHEREFORE,** your Plaintiff prays for the following relief:

a. That the Plaintiff may have judgment against the Defendants for compensatory damages to be proven at trial;

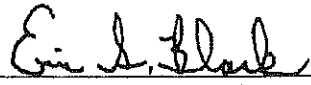
b. That in addition to the foregoing, the Plaintiff may have judgment against the Defendants for the Plaintiff's costs incurred in the prosecution of this action and recovery from the Defendants including all of the Plaintiff's reasonable attorney's fees and expenses in accordance with the terms of the original storm water agreement;

c. That the Plaintiff be awarded prejudgment and postjudgment interest on any judgments obtained against the Defendants as provided for by statute;

d. That the Plaintiff shall have such other and further relief as may be deemed meet and proper by this Court.

**PLAINTIFF DEMANDS A TRIAL BY JURY.**

Respectfully submitted,  
Plaintiff,  
By counsel,

  
Eric S. Black, Esquire  
State Bar I.D. #7567  
380 South Washington Street  
Berkeley Springs, West Virginia 25411  
Telephone: (304) 258-2931  
Facsimile: (304) 258-2932



Returned 3/28/01  
To Stephanie Johnson

655b  
DECLARATION

OF  
STORM WATER MANAGEMENT FACILITY EASEMENTS  
AND  
COVENANT TO SHARE COSTS

THIS DEED AND DECLARATION made and entered into this 23<sup>rd</sup> day of March, 2001, by and between VAN WYK ENTERPRISES, INC., a West Virginia corporation ("VWE"), FOXCROFT CONDOMINIUM OFFICE BUILDING UNIT OWNERS ASSOCIATION, INC., a West Virginia corporation ("FCO"), VIKING WAY LIMITED PARTNERSHIP, a West Virginia limited partnership ("VWLP"), FOXCROFT LIMITED PARTNERSHIP, a West Virginia limited partnership ("FLP"), and COLUMBUS, LLC, a West Virginia limited liability company ("Columbus") (collectively "Owners")

BACKGROUND STATEMENT

WHEREAS, FCO is the unit owners association for Foxcroft Condominium Office Building located at 300 Foxcroft Avenue, containing 2.104 acres, all as more fully shown upon a plat thereof prepared by Fox & Associates, Inc. dated November 11, 1990 and recorded in the office of the Clerk of the County Commission of Berkeley County, West Virginia in Deed Book No. 476, at page 265 ("FCO Property"), and

WHEREAS, VWE is the owner of Lot 1, containing 2.04 acres, known for postal purposes as 400 Foxcroft Avenue, as more fully shown upon a plat thereof prepared by Fox & Associates, Inc. dated August 6, 1994 and recorded in the aforesaid Clerk's office in Plat Cabinet No. 6, at Slide 34 ("VWE Property"), and

WHEREAS, VWLP is the owner of 5.32 acres, as more fully shown upon a plat thereof prepared by Fox & Associates, Inc. dated November 19, 1981 and recorded in the aforesaid Clerk's office in Plat Cabinet No. 2, at Slide 31, and further a second tract containing 0.40 acres, as more fully shown upon a plat thereof prepared by Fox & Associates, Inc. dated November 14, 1984 and recorded in the aforesaid Clerk's office in Deed Book No. 384, at page 561, of which only 1.55 acres is served by the Storm Water Management Facilities hereinafter defined (the 1.55 acres being the "VWLP Property"), and

WHEREAS, FLP is the owner of 5.12 acres, as more fully shown upon a plat thereof prepared by Fox & Associates, Inc. dated January 1981 and recorded in the aforesaid Clerk's office in Plat Cabinet No. 1, at Slide 68 ("FLP Property"), and

WHEREAS, Columbus is the owner of Lot 2, containing 0.83 acre, as more fully shown upon a plat thereof prepared by Fox & Associates, Inc. dated August 6, 1994 and recorded in the aforesaid Clerk's office in Plat Cabinet No. 6, at Slide 34, and further Lot 3, containing 2.12 acres, Parcel 3, containing 4.07 acres, Parcel 4, containing 8.97 acres, and Parcel 5, containing 5.43 acres, all as more fully shown upon a plat thereof prepared by Fox & Associates, Inc. dated August 1997 and recorded in the aforesaid Clerk's office in Plat Cabinet No. 7, at Slide 90 ("Columbus Properties"); and

WHEREAS, the VWE Property, the FCO Property, the VWLP Property, the FLP Property and the Columbus Properties are collectively hereinafter referred to as the "Commercial Property", and

WHEREAS, all of the Commercial Property have access to and are provided storm water management service by a storm water management pond located in Foxcroft Meadow Subdivision, which is more fully shown and set forth upon plats of certain portions of Foxcroft Meadow Subdivision, the first prepared by Fox & Associates, Inc. dated May 18, 1991 and recorded in the aforesaid Clerk's office in Plat Cabinet No. 4, at Slide 122, and the second prepared by Fox & Associates, Inc. dated June 11, 1991 and recorded in the aforesaid Clerk's office in Plat Cabinet No. 4, at Slide 186 ("Foxcroft Meadow Plats"); and

WHEREAS, surface waters in the Commercial Property drain to the storm water management pond reflected on the Foxcroft Meadow Plats through a surface and subsurface drainage system consisting of head walls, pipes, grates, drainage swales and patterns, and other drainage facilities and easements running over, across, upon and through some of the Commercial Property as now located, under Foxcroft Avenue, under the common access easement shown upon the plat for Lots 1 and 2, and thence flowing generally to and through that certain area over Parcel 4 shown as a forty-foot (40') sanitary sewer easement running from the easterly side of Foxcroft Avenue in an easterly direction to the westerly side of the cul-de-sac in Foxcroft Meadow Subdivision, all of which is shown on that certain plat prepared by Fox & Associates, Inc. dated August 1997 and

recorded in the aforesaid Clerk's office in Plat Cabinet No. 7, at Slide 90, where said waters then enter an underground pipe running under Azalea Drive within Foxcroft Meadow Subdivision to the storm water management pond located in Foxcroft Meadow Subdivision, all of which, including the storm water management pond, is hereinafter referred to as "Storm Water Management Facilities" or "SWMF", and

WHEREAS, all of the parties hereto and their successors and assigns as the Owners of the Commercial Property and any and all subdivisions thereof, will benefit from the maintenance of the storm water management pond and all of the drainage facilities installed to permit the surface water drainage into such storm water management pond, including, but not being limited to, all of the head walls, pipes, grades, drainage swales and easements hereinbefore referred to, and

WHEREAS, the maintenance of all of the existing and hereafter constructed Storm Water Management Facilities will enhance the value of the Commercial Property and any and all subdivisions thereof; and

WHEREAS, the parties hereto desire to provide for an equitable allocation of the cost of such maintenance between the present and future owners of the Commercial Property and any and all subdivisions thereof, and for the cross-easements necessary to provide for and permit the existence and location of all of such existing and hereafter constructed Storm Water Management Facilities,

NOW, THEREFORE, WITNESSETH That FCC, VWE, VWLP, FLP and Columbus, for themselves and their successors and assigns, do hereby declare that the Commercial Property shall be held, sold and conveyed subject to the covenants, conditions, easements and rights-of-way contained herein which are made for the express benefit of the parties hereto, the Association hereinafter referred to and to all of their successors and assigns, which shall run with the title to the Commercial Property and shall bind all parties having any right, title or interest in the same, or any part thereof, their heirs, successors in title and assigns and shall inure to the benefit of each and every one of the parties hereto and each and every Owner of any part of all of the Commercial Property covered hereby and their successors and assigns

#### ARTICLE I

##### Management Association

For the purpose of maintaining and reconstructing the Storm Water Management Facilities and easements (the "Maintenance Property" as more fully set forth and defined below), each Owner,

The Association shall maintain and keep in good repair the Maintenance Property. This maintenance shall include, but need not be limited to, maintenance, repair, replacement and reconstruction of all landscaping and other flora, structures and improvements situated upon and comprising the Maintenance Property. Such maintenance, repair, replacement and reconstruction shall be done in and the Maintenance Property shall be maintained in a good and workmanlike manner.

### Obligation to Share Costs

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adequately perform the maintenance responsibility herein provided for, any Owner shall have the right to enforce all of the obligations provided for herein.

**Section 2 Maintenance Property.** The Maintenance Property, as such term is used herein, shall refer to all the following property: the storm water management pond area with all related facilities and drainage easement for storm water for the management pond, all as more fully set forth and reflected the plats for Foxcroft Meadow Subdivision, as more fully hereinbefore set forth and described, together with all culverts, pipes, drains, head walls, drainage swales, fencing, shrubbery, grass, grates, drainage easements or such other facilities permitting the storm water surface waters to drain to the storm water management pond, as now or hereafter developed, presently consisting of two drainage pipes under Foxcroft Avenue, with related head walls and facilities, a concrete masonry pipe across the southwest corner of Lot 2 and under the common access easement to Lots 1 and 2, and onto a portion of Lot 3, all as more fully shown on that certain plat prepared by Fox & Associates, Inc. dated August 6, 1994 and recorded in the aforesaid Clerk's office in Plat Cabinet No. 6, at Slide 34, and the grates, head wall and concrete masonry pipe running the entire length under Azalea Drive from the easterly side of Parcel 4 on the west to the storm water management pond on the east, all of which said facilities shall be repaired, replaced and maintained by the Association. The Owners of the Units of the Commercial Property shall originally construct and subsequently use and maintain their Units in a fashion which permits the storm water to drain to and into the storm water management pond area in accordance with the presently existing or hereafter created drainage patterns and easements through and over all portions of the Commercial Property through the existing pipes and ways or subsequently installed pipes and ways and in accordance with sound and reasonable engineering standards. The Maintenance Property shall further include any enlargements of or additions to the Storm Water Management Facilities caused or created by development of Units within the Commercial Property, provided, however, the Maintenance Property does not include any culverts, drains, drainage easements or such other facilities presently located on any of the Units, excluding those facilities hereinbefore described as running under Foxcroft Avenue or over the southwest corner of Lot 2 and under the common access easement to Lots 1, 2 and 3, all of which such remaining drainage facilities shall, except as hereinafter provided, be constructed and maintained individually by the Owners of the Units upon which said culverts, drains and drainage easements are located in a fashion which permits the storm water to drain to and

into the storm water management pond in accordance with the presently established drainage patterns, a portion of which facilities are presently in place. The Owners of the Units of the Commercial Property shall further originally construct and subsequently use and maintain their Units and sites in a fashion which permits the storm water to drain to and into the storm water management pond in accordance with the presently established drainage patterns and the drainage facilities presently in place and the use hereinafter established and constructed, all of which shall be done in accordance with sound and reasonable engineering standards. The Maintenance Property shall further include any enlargements of, modifications of or additions to the existing Maintenance Property caused or created by development of Units within the Commercial Property, all of which shall be done in accordance with sound and reasonable engineering standards permitting the storm water to drain to and into the storm water management pond.

Section 3 Computation of Assessments. On an annual basis, the Association shall determine an estimated budget for maintaining, repairing, replacing, and insuring the Maintenance Property during the upcoming year in a manner consistent with, and to the level of good and reasonable engineering standards, which budget may include an appropriate amount to be placed in a reserve fund for capital repairs and replacements and reasonable liability insurance. Such budget shall be adjusted to reflect any excess or deficiency in the budget assessed for the immediately preceding year, as compared to actual expenses for that period. Such budget shall be developed in a manner reflecting the cost allocated to maintaining, repairing, replacing and insuring the storm water management pond and allocated to the Maintenance Property as a whole.

One hundred percent (100%) of the annual budget, as adjusted (hereinafter "Commercial Basis"), shall be used as the basis for computing the total annual assessment obligation for the Commercial Property. The percentage of the total annual assessment payable by each Owner of any portion of the Commercial Property shall be based on the relative acres contained in each Owner's Unit as compared to the total acres of all of the Units in the Commercial Property and shall be determined by the following formula.

Total Number of Acres Owned by Commercial Owner	x	Annual Budget (Dollars)	= Assessment
Total Number of Acres in the Commercial Property			

**Section 4** Failure of Owner of Units to Maintain. In the event an Owner of a Unit fails to maintain the Storm Water Management Facilities located upon the Owner's Unit and for which said Owner Unit is responsible, the Association, after having first given the Unit Owner thirty (30) days' written notice of the Association's determination that the Storm Water Management Facilities located on said Owner's Unit are in need of maintenance and the details thereof, and that if said Unit Owner does not provide the necessary maintenance within thirty (30) days of the date of notice, shall have the right to provide the necessary maintenance and assess the reasonable costs thereof to the Unit Owner upon which said Storm Water Management Facilities are located. The cost of such maintenance shall be due and payable by said Unit Owner within twenty (20) days of the date of the bill; therefore and such assessment shall be a lien upon the Unit as hereinafter set forth in Section 5.

**Section 5** Payment of Assessments. Within thirty (30) days of receipt of notice of an annual assessment, each Owner of any portion of the Commercial Property shall pay to the Association the entire amount due. Any assessment delinquent for a period of more than thirty (30) days shall incur a late charge in such amount as the Association may from time to time reasonably determine. If any assessment is not paid when due, a lien, as herein provided, shall attach to the property of the delinquent Owner within the Commercial Property, as applicable, and, in addition, the lien shall include the late charge, interest (not to exceed the maximum lawful rate) on the principal amount due and all late charges from the date first due and payable, all costs of collection, reasonable attorney's fees actually incurred, and any other amounts provided or permitted by law. In the event that any assessment remains unpaid after ninety (90) days, the Association may institute suit to collect such amounts and to foreclose its lien. The lien provided for in this Article shall be in favor of the Association, acting through its Board and on behalf of its members, shall have the power to bid at any foreclosure sale or to acquire, hold, lease, mortgage, or convey foreclosed property. Upon recording of a notice of lien on any Commercial Unit, there shall exist a perfected lien for unpaid assessments prior and superior to all other liens, except (1) all taxes, bonds, assessments, and other levies which by law would be superior thereto, and (2) the lien or charge of any first Mortgage of record (meaning any recorded Mortgage with first priority over other Mortgages) made in good faith and for value. Such lien, when delinquent, may be enforced by suit, judgment, and foreclosure.

All payments shall be applied first to costs and attorney's fees, then to late charges, then to interest and then to delinquent assessments. The initial annual assessment to be levied shall be reduced pro rata based upon the number of months remaining in the fiscal year adopted by the Association after the month in which all or portion of the Commercial Property is first conveyed by Declarant.

### ARTICLE III

#### Drainage Easements

The ownership interests in the Units described in this Declaration are subject to the easements granted and reserved in this Declaration. Each of the easements reserved or granted herein shall be deemed to be established upon the recordation of this Declaration and shall thenceforth be deemed to be covenants running with the land for the use and benefit of the Owners. All other encumbrances applied against or in favor of any portion of the Commercial Property. Individual grant deeds to the respective Units may, but shall not be required to, set forth the easements specified in this Declaration.

The Units and all portions of the Commercial Property are subject to the easements and rights-of-way shown on the plat or plats of the Units and the Commercial Property and are further subject to the easements and rights-of-way for the presently existing drainage swales and existing pipes and facilities where they now lie, all of which may be reasonably modified and/or relocated in the future so long as such modifications and/or relocations are done in accordance with sound and reasonable engineering standards and in a manner which permits surface water to drain to and through the Storm Water Management Facilities and the Maintenance Property to the storm water management pond.

Every Owner shall have a perpetual, non-exclusive right and easement of use and enjoyment in and to the Maintenance Property, which shall be appurtenant to and shall pass with the title to every Unit.

There are reserved and granted for the benefit of each Unit, as the dominant tenements, over, under, across and through the other Units, and the road rights-of-way within the Commercial Property, as the servient tenements, non-exclusive easements for the Storm Water Management Facilities, the Maintenance Property and the drainage easements.



There are hereby reserved to the Association and their duly authorized agents and representatives such easements as are necessary to perform the duties and obligations of the Association set forth in this Declaration, including, without limitation, the right to enter upon Units and roadways within the Commercial Property to fulfill their duties and responsibilities. Entry shall be made with as little inconvenience to an Owner as practicable and only after reasonable advance written notice of not less than twenty-four (24) hours, except in emergency situations.

Within all easements, no structures, planting or other materials shall be placed or permitted to remain and no grading features shall be created which may damage or interfere with the use, installation, reconstruction and maintenance of the Storm Water Management Facilities and the Maintenance Property or which may change the direction of or the flow of drainage channels or which may obstruct or retard the flow of water through the drainage easements, the Storm Water Management Facilities and the Maintenance Property.

#### ARTICLE V

##### General

Section 1 Notice. Any notice provided for in this Declaration shall be served personally or shall be mailed by registered or certified mail to the president or secretary of the Association or to the Owner of any portion of the Commercial Property at the address of such property or such other address as is registered with the Association, as applicable. All such notices shall, for all purposes, be deemed delivered (a) upon personal delivery to the party or address specified above, or (b) on the third (3rd) day after mailing when mailed by registered or certified mail, postage prepaid, and properly addressed.

Section 2 Amendment. This Declaration may be amended unilaterally at any time and from time to time by VWE and Columbus (a) if such amendment is necessary to bring any provision hereof into compliance with any applicable governmental statute, rule or regulation or judicial determination which shall be in conflict therewith; (b) if such amendment is necessary to enable any reputable title insurance company to issue title insurance coverage with respect to any portion of the Commercial Property subject to this Declaration; (c) if such amendment is required by an institutional or governmental lender or purchaser of mortgage loans, including, for example, the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation, to enable such lender or purchaser to make or purchase mortgage loans on any portion of the Commercial Property;

or (d) if such amendment is necessary to enable any governmental agency or reputable private insurance company to insure mortgage loans on any portion of the Commercial Property; provided, however, any such amendment shall not, unless the Owner thereof shall consent thereto in writing, adversely affect the title to any property or alter any Owner's rights, responsibilities or burdens under this Declaration, including, but not limited thereto, withdrawing any real estate from the Commercial Property, or eliminating or reducing any Owner's proportionate share of the maintenance assessments

In addition to the above, this Declaration may be amended upon the affirmative vote or written consent, or any combination thereof, of the Owners of property comprising at least 51% of the Commercial Property as a whole. Amendments to this Declaration shall become effective upon recordation, unless a later effective date is specified therein

Any procedural challenge to an amendment must be made within six (6) months of its recordation. In no event shall a change of conditions or circumstances operate to amend any provisions of this Declaration.

Notwithstanding anything to the contrary in this Section, no amendment hereto shall materially adversely affect the Unit of any Owner without the prior written consent of the Owner of the affected Unit.

Section 3. Duration. The provisions of the Declaration shall run with and bind the land and shall be and remain in effect for a period of thirty (30) years after the date that this Declaration is recorded, after which time they shall be automatically extended for successive periods of ten (10) years, unless such extension is disapproved by at least a two-thirds majority of the Owners of property comprising at least two-thirds of the Commercial Property as a whole, provided, however, until such time as the management of the storm water surface waters for the Commercial Properties is otherwise provided for in a manner acceptable to and permitted by the Martinsburg Planning Commission or its successors, this Declaration shall remain in full force and effect. Every purchaser or grantee of any interest in any portion of the Commercial Property, by acceptance of a deed or other conveyance therefor, agrees that the provisions of this Declaration may be extended and renewed as provided in this Section

Section 4 Binding Effect. This Declaration shall be binding upon and shall inure to the benefit of every Owner of any portion of the Commercial Property, their successors and assigns, and shall also inure to the benefit of the Association.

Section 5 Interpretation. This Declaration shall be governed by and construed under the laws of the State of West Virginia.

Section 6 Gender and Grammar. The singular, wherever used herein, shall be construed to mean the plural, when applicable, and the use of the masculine pronoun shall include the neuter and feminine.

Section 7 Severability. Whenever possible, each provision of this Declaration shall be interpreted in such manner as to be effective and valid, but if the application of any provision of this Declaration to any person or to any property shall be prohibited or held invalid, such prohibition or invalidity shall not affect any other provision or the application of any provision which can be given effect without the invalid provision or application, and, to this end, the provisions of this Declaration are declared to be severable.

Section 8. Captions. The captions of each Article and Section hereof, as to the contents of each Article and Section, are inserted only for convenience and are in no way to be construed as defining, limiting, extending, or otherwise modifying or adding to the particular Article or Section to which they refer.

Section 9. Specific Performance. The provisions of this Declaration are enforceable by the remedy of specific performance.

#### ARTICLE VI

##### Addition of Adjoining Real Estate

By deed dated November 7, 1991 and recorded in the aforesaid Clerk's office in Deed Book No. 489, at page 410, Van Wyk Enterprises, Inc. conveyed to Dwain A. Donaldson and Katherine H. Donaldson a parcel of land containing 1.00 acre ("Donaldson Property"). By deed dated January 17, 1997 and recorded in the aforesaid Clerk's office in Deed Book No. 576, at page 106, Leamas Development, L.C. conveyed to F & M Bank - Martinsburg a parcel of land containing 0.7577 acre ("FM Property").

All of the parties hereto covenant and agree that the Donaldson Property and/or the FM Property may be added to the Commercial Property by the owner of such parcels of real estate.

executing and recording in the Berkeley County land records a Supplementary Declaration subjecting their respective parcel of real estate to the terms and conditions of this Declaration. The Association is required to execute any such Supplementary Declaration to consent to the form and effect of such Supplementary Declaration.

#### ARTICLE VII

##### VWE/Columbus Reservations and Exceptions

VWE and/or Columbus RESERVE and EXCEPT unto themselves, their successors and assigns, the full and complete right at their cost and expense to amend, modify and change the present drainage patterns, easements and facilities on the VWE Property and the Columbus Properties in the development and redevelopment of such real estate, provided, however, that all such amendments, modifications and changes shall be engineered and constructed in accordance with reasonable engineering and construction standards and shall permit the storm water to continue to drain to and into the pipe running under Azalea Drive to the storm water management pond.

VWE and/or Columbus further RESERVES and EXCEPTS unto themselves, their successors and assigns, the full and complete right at their cost and expense to increase the size and capacity of the storm water management pond located in Foxcroft Meadow Subdivision so that such pond shall have the capacity to serve 34.3 commercial acres of which the Commercial Property is a part. Such changes and modifications to the storm water management pond shall be engineered and constructed in accordance with reasonable engineering and construction standards.

VWE and/or Columbus shall have easements of access to, from and upon the SWMP and Maintenance Property for purposes of exercising their rights reserved herein.

WITNESS the following signatures as of the day and date first above written:

VAN WYK ENTERPRISES, INC., a West Virginia corporation

By: Bruce M. Van Wyk  
Bruce M. Van Wyk, President

FOXCROFT CONDOMINIUM OFFICE BUILDING  
UNIT OWNERS ASSOCIATION, INC., a West Virginia corporation

By: Bruce M. Van Wyk  
Bruce M. Van Wyk, President

VIKING WAY LIMITED PARTNERSHIP, a West Virginia limited partnership

By: VAN WYK ENTERPRISES, INC., a West Virginia corporation, General Partner

By: Bruce M. Van Wyk  
Bruce M. Van Wyk, President

FOXCROFT LIMITED PARTNERSHIP, a West Virginia limited partnership

By: VAN WYK ENTERPRISES, INC., a West Virginia corporation, Managing General Partner

By: Bruce M. Van Wyk  
Bruce M. Van Wyk, President

COLUMBUS, LLC, a West Virginia limited liability company

By: Bruce M. Van Wyk  
Bruce M. Van Wyk, Manager

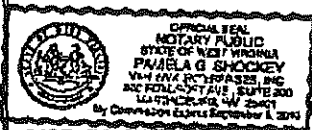
STATE OF WEST VIRGINIA,

COUNTY OF BERKELEY, TO-WIT.

I, Pamela G. Shockey, a notary public of said county, do certify that BRUCE M VAN WYK, the President of VAN WYK ENTERPRISES, INC., a West Virginia corporation, who signed the writing hereto annexed, bearing date as of the 23<sup>rd</sup> day of March, 2001, has this day in my said county, before me, acknowledged the same to be the act and deed of said corporation

Given under my hand this 24<sup>th</sup> day of March, 2001.

My commission expires September 5, 2010



(NOTARIAL SEAL)

Pamela G. Shockey  
Notary Public

STATE OF WEST VIRGINIA,

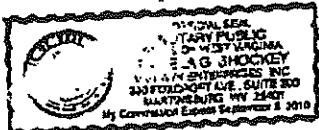
COUNTY OF BERKELEY, TO-WIT

I, Pamela G. Shockey, a notary public of said county, do certify that BRUCE M VAN WYK, the President of FOXCROFT CONDOMINIUM OFFICE BUILDING UNIT

BUILDING UNIT OWNERS ASSOCIATION, INC., a West Virginia corporation, who signed the writing hereto annexed, bearing date as of the 23<sup>rd</sup> day of March, 2001, has this day in my said county, before me, acknowledged the same to be the act and deed of said corporation

Given under my hand this 26<sup>th</sup> day of March, 2001

My commission expires September 5, 2010



Pamela G. Shockey  
Notary Public

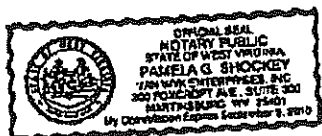
(NOTARIAL SEAL)

STATE OF WEST VIRGINIA,  
COUNTY OF BERKELEY, TO-WIT

I, Pamela G. Shockey, a Notary Public in and for said state and county, do hereby certify that BRUCE M. VAN WYK, President of VAN WYK ENTERPRISES, INC., a West Virginia corporation, acting as General Partner of and on behalf of VIKING WAY LIMITED PARTNERSHIP, a West Virginia limited partnership, who signed the writing hereto annexed, bearing date as of the 23<sup>rd</sup> day of March, 2001, has this day in my said county, before me, acknowledged the same to be the act and deed of said corporation and said limited partnership

Given under my hand this 26<sup>th</sup> day of March, 2001.

My commission expires September 5, 2010



Pamela G. Shockey  
Notary Public

(NOTARIAL SEAL)

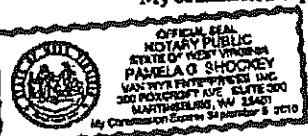
STATE OF WEST VIRGINIA,  
COUNTY OF BERKELEY, TO-WIT.

I, Pamela G. Shockey, a Notary Public in and for said state and county, do hereby certify that BRUCE M. VAN WYK, President of VAN WYK ENTERPRISES, INC., a West Virginia corporation, acting as Managing General Partner of and on behalf of FOXCROFT LIMITED PARTNERSHIP, a West Virginia limited partnership, who signed the writing hereto

annexed, bearing date as of the 23<sup>rd</sup> day of March, 2001, has this day in my said county, before me, acknowledged the same to be the act and deed of said corporation and said limited partnership

Given under my hand this 26<sup>th</sup> day of March, 2001

My commission expires September 5, 2010



Pamela G. Shockey  
Notary Public

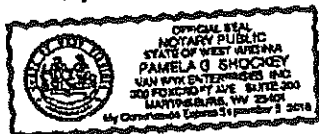
(NOTARIAL SEAL)

STATE OF WEST VIRGINIA,  
COUNTY OF BERKELEY, TO-WIT:

I, Pamela G. Shockey, a notary public of said county, do certify that BRUCE M. VAN WYK, the Manager of COLUMBUS, LLC, a West Virginia limited liability company, who signed the writing hereto annexed, bearing date as of the 23<sup>rd</sup> day of March, 2001, has this day in my said county, before me, acknowledged the same to be the act and deed of said limited liability company

Given under my hand this 26<sup>th</sup> day of March, 2001

My commission expires September 5, 2010



Pamela G. Shockey  
Notary Public

(NOTARIAL SEAL)

BERKELEY COUNTY, WV  
FILED  
March 28, 2001 10:58:05

JOHN H. SHALL JR.  
COUNTY CLERK  
TRANSACTION NO: 2001006554

BOOK OF DEEDS  
Book: 00665 Page: 00354

